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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,

Petitioners,

VERSUS

SKELLY OIL COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF PETITIONERS

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November, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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OPINION BELOW

The opinion and judgment of the trial court and the Oklahoma Supreme Court are printed in Appendix (A. 46-48, 61-69).[1]

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Oklahoma was entered on May 24, 1966 (A. 61-69). A petition for rehearing was timely filed on July 8, 1966, and denied December 20, 1966 (A. 73). An application

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[1] Legend to References: To appendix this brief (brief app. .....); To Appendix of Record (A. .....).

for second petition for rehearing was denied January 31, 1967. The jurisdiction of the Court is invoked under Title 28 U.S.C.A. Section 1257(2)(3) and Rule 19 of the Supreme Court of the United States. The petitioners have exhausted all of their state court remedies. The constitutional and federal questions were presented to the Supreme Court of the State of Oklahoma in the petition for rehearing (A. 71-72), such constitutional and federal questions first arising herein on May 24, 1966, when the opinion and judgment of the Supreme Court of the State of Oklahoma was rendered and entered herein. Timely Notice of Appeal filed and served (A. 75-78). Petition for Certiorari filed March 17, 1967.

CONSTITUTION, STATUTES AND FEDERAL REGULATIONS INVOLVED

Constitution

The Constitution of the State of Oklahoma, Article 1, Section 1:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article 2, Section 7:

> "No person shall be deprived of * * * property, without due process of law."

Constitution of the United States, 5th Amendment:

> "No person shall be deprived of property without due process of law."

Constitution of the United States, 14th Amendment:

"Nor shall any state deprive any person of life, liberty, or property without due process of law."

Statutes

General Allotment Act, February 8, 1887, 24 Stat. 388, 25 U.S.C. 331 et. seq. (Relevant provisions, 25 U.S.C. Sections 345, 347, 348 and 396 [brief app. iii, iv, v, vi].)

Federal Regulations

7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, in part. (Section 221.3, 221.4, 221.18, 221.21, 221.62, 221.63, and 221.60 [brief app. i-ii].)

Title 25, C.F.R. Section 172.23 (brief app. ii).

Title 30, Chapter 11, C.F.R. Section 221.35 (brief app. iii).

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Oklahoma in its opinion and judgment of May 24, 1966, erroneously construed the terms and provisions of the Departmental Oil and Gas Mining Lease of Restricted Lands of the Indian petitioners herein, and federal regulations pertaining thereto, *viz.*, 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, Section 221.3, 221.4, 221.18, 221.21, 221.62, 221.63 and 221.60 and Title 25 C.F.R. Section 172.23?

2. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein is in conflict with applicable decisions of this Court?

3. Whether the laws of the United States providing for Departmental Oil and Gas Mining Leases upon restricted lands of Indian petitioners, and all federal regulations pertaining thereto are for the protection of Indian petitioners, as lessors, and whether such federal regulations can be interposed by respondent lessee herein to avoid liability for damages resulting from breach of express and implied covenants of such oil and gas mining lease?

4. Whether Indian petitioners, as lessors in a Departmental Oil and Gas Mining Lease on restricted lands, can institute and maintain this action for damages for waste of natural gas by lessee in violation of the express and implied covenants of said lease contract, after due and proper notice has been given the United States, as by law provided, and the United States has elected not to enter such case in behalf of Indian lessors, petitioners herein?

5. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein, in denying petitioners (Indian lessors) the right to institute and maintain this action against respondent (lessee) for damages for waste of natural gas by respondent in violation of express and implied covenants of Departmental Oil and Gas Mining Lease, when the United States after due notice elected not to enter into this case, violates and offends the rights of petitioners herein under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States and deprives petitioners of their property and rights without due process of law?

STATEMENT OF THE CASE

On August 9, 1961, petitioners filed suit against respondent for damages alleging respondents breached express and implied covenants of a Departmental Oil and Gas Mining Lease upon the restricted Indian lands of petitioners who are Comanche Indians, by wasting natural gas from leased lands. Petitioners are lessors in said lease and respondent is lessee therein (A. 5-11). Notice was given the United States (A. 20-23).

Respondent interposed a demurrer to petitioners' Amended Petition and the trial court sustained its demurrer, and entered judgment against petitioners (A. 46-48). An appeal was perfected to the Supreme Court of Oklahoma, and on May 24, 1966, an opinion and judgment of the Supreme Court of Oklahoma was entered affirming the judgment of the trial court (A. 61-69). Petitioners filed a timely petition for rehearing, which was denied on December 20, 1966 (A. 73). An application for second petition for rehearing was denied on January 31, 1967.

Notice of Petition for Certiorari and Appeal was filed and served upon respondent on February 1, 1967 (A. 75-78). Petition for Certiorari filed March 17, 1967. Certiorari granted October 9, 1967.

SUMMARY OF ARGUMENT

A. Indian petitioners, as owners of the land involved, and as lessors in the Departmental Oil and Gas Mining Lease, have a right to bring this action against respondent, as lessee, seeking damages for alleged breach of the express and implied covenants of said lease. The fact petitioners are

Indians and the land is subject to federal regulations does not destroy their right to so sue. This right of Indians has been recognized both by federal legislation and in court decisions. After due notice, as given herein, the United States may elect to enter the case, but if the United States does not elect to enter the case, the Indians alone can maintain such litigation to a conclusion.

B. Nothing is contained in federal regulations, or in the lease itself, which prevents or precludes petitioners, as Indian lessors, from bringing and maintaining this suit. In fact the federal regulations are a shield for the protection of the interests of American Indian citizens, and are not to be construed as a sword by which respondent lessee herein can prevent Indian petitioners from seeking, by court action, to reap the benefits of their heritage.

C. The decision of the Oklahoma Supreme Court herein is unsound, and should be reversed.

BRIEF AND ARGUMENT

Petitioners, who are Comanche Indians, are lessors in a Departmental Oil and Gas Mining Lease and respondent is lessee. The lease was approved by the Secretary of the Interior. Respondent drilled seven (7) producing oil and gas wells on the lands involved and permitted great quantities of gas to escape and flare from said wells, notwithstanding a pipeline affording a market for said gas was located within one-half (½) mile of the producing wells. Petitioners filed suit for money damages, alleging (A. 40, 41):

". . . That said defendant failed and refused to market said gas, and in addition thereto failed and

> refused to exercise reasonable diligence in the prevention of waste of the gas produced and developed from said land and preserve said oil and gas producing properties as is required by said oil and gas lease. That defendant wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has illegally committed waste in the premises in direct violation of the express terms, conditions, and covenants of the aforesaid oil and gas mining lease, which is attached to the original petition herein marked Exhibit 'A', and made a part of this amended petition by reference."

Notice was given the United States (A. 20). It was alleged that the United States authorized petitioners to employ counsel and consented to the filing of this action (A. 41).

The trial court sustained a Demurrer and dismissed the action (A. 46-48), and the Oklahoma Supreme Court affirmed (A. 61-69). A Demurrer, under the law of Oklahoma, admits the truth of all allegations, and reasonable inferences to be drawn therefrom. *Farmers and Merchants Nat'l Bank* v. *Lee*, 192 Okla. 9, 132 P.2d 931.

Under Oklahoma law a lessee in an oil and gas lease is liable in damages for waste, and failure to market gas produced. *Junction Oil & Gas Co.* v. *Pratt*, 99 Okla. 14, 225 Pac. 717; *North American Petroleum Co.* v. *Knight* (Okla.), 321 P.2d 964.

The crucial question in this case is whether the Indian petitioners have legal capacity to institute and maintain this action, after due notice is given the United States, or whether such an action can only be brought and maintained by the United States.

In *Heckman* v. *United States,* 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820, this Court determined a restricted Indian allottee could sue in his own behalf subject to the right of the United States to intervene. In *Heckman* it is said (224 U.S. 446, 56 L.Ed. 833):

> ". . . In what cases the United States will undertake to represent Indian owners of restricted lands of this sort is left, under the Acts of Congress, to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the Tiger case. . . ."

In *Sadler* v. *Public National Bank & Trust Co.*, 172 F.2d 874, the Court of Appeals for the Tenth Circuit held squarely that a restricted Indian is not without capacity to sue or to be sued with respect to his affairs, including his restricted property. The only difference between an Indian in such case as this, and other litigants, is that when such an Indian files suit notice must be served upon the United States, which notice was served in this case.

The *Heckman* and *Sadler* cases involved restricted Indians of the Five Civilized Tribes, and petitioners here are Comanche Indians, but we submit the principle is identical. These cases establish clearly that an Indian lessor in a Departmental Oil and Gas Lease, as well as the United States, has the capacity to sue relative to causes of action arising from breach of covenants of such a lease.

The oil and gas lease involved herein covers land which petitioners hold under trust patents. Petitioners acquired their property under the General Allotment Act, February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331,

et seq. Section 5 of the Act, in part, 25 U.S.C. 348 (brief app. v) provides ". . . that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . .," or his heirs. As that provision permits, the twenty-five year period has been repeatedly extended by order of the President and the trust continues at this date.

The General Allotment Act expressly authorized suits by Indians against the United States to establish entitlements to allotments, 25 U.S.C. 345 (brief app. iii-iv), and adverts to ". . . actions brought in any State court or United States court by any patentee . . . for the possession or rents or profits of . . ." lands under trust patent. 25 U.S.C. 347 (brief app. iv).

The purpose of the trust and restrictions was and is to prevent improvident conveyances of allotted lands. These restrictions are for the protection of the Indian allottees, and, of course, are not to prevent the Indian from developing the resources of the lands, and deny him to reap the fruits and benefits of any development thereof by the lessee in any approved Departmental Oil and Gas Mining Lease.

The Indian allottee is expressly authorized to make an oil and gas mining lease, with the consent of, and under the rules prescribed by, the Secretary of the Interior for the Indian's benefit and protection. 25 U.S.C. 396 (brief app. v-vi). It follows that a suit by the Indian to enforce a legal right under such a lease so as to enhance his benefits thereunder is in accord with the purposes of the Act.

Particularly so in this action, which is a suit of this character for damages against respondent and the Secretary consented to its institution.

We submit that the United States, by the General Allotment Act (and other statutes pertaining to the Five Civilized Tribes) established certain protective restrictions against alienation for the benefit and protection of American Indians, but such restrictions do not disable or prevent such Indians from endeavoring to enforce and protect their interests in allotted lands by legal proceedings. *Heckman* v. *U. S., supra*; *Sadler* v. *Public National Bank and Trust Co., supra*; *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456 (C.A. 10); *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 39 S.Ct. 185, 63 L.Ed. 504; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553; 23 S.Ct. 216, 47 L.Ed. 299; *Creek Nation* v. *U. S.*, 318 U.S. 629, 640, 63 S.Ct. 784, 87 L.Ed. 1046; *U. S.* v. *Candelaria*, 271 U.S. 432, 443, 444, 46 S.Ct. 561, 563, 70 L.Ed. 1023.

The Oklahoma Supreme Court in its opinion and decision herein (A. 61-69) held that only the United States could sue to enforce petitioners' rights under the oil and gas lease involved. We submit this decision is unsound and in conflict with *Heckman, Sadler and Seitz*. Also it is clearly against the very purpose of the Federal Legislation, namely, the policy of restrictions is for the protection of the rights of the Indians, not for the destruction of his benefits.

The rules and regulations promulgated by the Secretary of the Interior, set out in the Oklahoma Supreme Court opinion (brief app. i-ii), are clearly rules and regulations for the benefit of the Indian lessor. The state court's de-

cision is a strained construction of these rules and regulations and, we submit, is unsound. Actually, the regulation most apropos to the inquiry in this case is Title 30, Chapter 11, C.F.R., Section 221.35 (brief app. iii) which specifically pertains to waste prevention of oil and gas by such a lessee as respondent. The Oklahoma Supreme Court did not refer to Section 221.35 in its decision. Under this regulation it is specifically provided that a lessee (respondent) shall pay lessor (petitioners) the full value of all gas wasted by blowing, release, escape, or otherwise unless determined to be sanctioned by the laws of the United States and of the State in which it occurs.

In our suit we allege that respondent wrongfully permitted gas to flare and escape and illegally committed waste to the damage of the Indian lessors in the amount of $114,000.00. The demurrer admits the truth of these averments. Nevertheless, we submit the State Court decision, instead of construing the above statutes and regulations for the benefit and protection of the Indian lessors, has ruled the same to be a sword by which the respondent lessee can prevent the Indians from attempting to enforce and protect their interests in allotted lands by legal proceedings.

The foregoing authorities, we submit, show clearly that the Indian petitioners have a right to bring this action in the state courts of Oklahoma, and after due notice to the United States and its election not to intervene therein, such Indian petitioners have a legal right to maintain this action. Consequently, the Oklahoma Supreme Court, by its opinion and decision herein deprived Indian petitioners of their property, and property rights, without due process of law; contrary to the Fourteenth (14th) Amendment.

Scott v. *McNeal,* 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896; *Ex parte Virginia,* 100 U.S. 339, 346-347, 25 L.Ed. 676, 679, 680; *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 697.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the opinion and decision of the Oklahoma Supreme Court in this action deprives petitioners of their property and property rights without due process of law contrary to the Fourteenth (14th) Amendment to the Constitution of the United States, and such opinion and decision should be reversed by this Honorable Court.

Respectfully submitted,

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APPENDIX

Title 30, C.F.R., 1966 Revision, in part:

(§221.3) "Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in the amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts * * *."

(§221.4) "The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law * * *."

[APPENDIX]

(§221.18) "The lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, . . . * * *."

(§221.21) "The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor * * *."

(§221.62) "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor * * *."

(§221.63) "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

(§221.60) "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor * * *."

Title 25, C.F.R., Sec. 172.23 provides in part:

"(A) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated * * *."

Title 30, Chapter 11, C.F.R.:

"§ 221.35 Waste prevention: beneficial use.

"The lessee is obligated to prevent the waste of oil or gas and to avoid physical waste of gas the lessee shall consume it beneficially or market or return it to the productive formation. If waste of gas occurs the lessee shall pay the lessor the full value of all gas wasted by blowing, release, escape, or otherwise at a price not less than 5 cents for each 1,000 cubic feet, unless, on application by the lessee, such waste of gas under the particular circumstances involved shall be determined by the Secretary to be sanctioned by the laws of the United States and of the State in which it occurs. The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of value and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Title 25, U.S.C., Section 345:

"§ 345. Actions for allotments

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to

any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases. Aug. 15, 1894, c. 290, § 1, 28 Stat. 305; Feb. 6, 1901, c. 217, § 1, 31 Stat. 760; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

Title 25, U.S.C., Sec. 347:

"§ 347. Limitations of actions for lands patented in severalty under treaties

"In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to other than members of any tribe of Indians. May 31, 1902, c. 946, § 1, 32 Stat. 284."

Title 25, U.S.C., Section 348 in part:

"§ 348. Patents to be held in trust; descent and partition

"Upon the approval of the allotments provided for in sections 331-334 of this title, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. . . ."

Title 25, U.S.C., Section 396:

"§ 396. Leases of allotted lands for mining purposes

"All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: *Provided,* That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified

bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale. Mar. 3, 1909, c. 263, 35 Stat. 783; Aug. 9, 1955, c. 615, § 3, 69 Stat. 540.